STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF JILL A. SLEVIN, Claimant, vs. UNITED PARCEL SERVICE, INC., an Ohio corporation registered with the Montana Secretary of State d/b/a UPS, Respondent.	Case No. 2163-2012 **FINAL AGENCY DECISION**

* * * * * * * * * *

I. INTRODUCTION

On June 5, 2012, Jill A. Slevin filed a claim with the Department of Labor and Industry. In her claim, Slevin contended United Parcel Service, Inc., an Ohio corporation registered with the Montana Secretary of State, d/b/a UPS, owed her $4,405.00 in unpaid wages, $1,205.00 in unpaid commissions, and $4,845.50 in unpaid vacation time, for a total of $10,455.50. On June 25, 2012, UPS filed a response to Slevin's claim contending Slevin was not owed additional compensation for wages or vacation time. UPS conceded Slevin was owed for unpaid commission for the second quarter of 2012.

On September 21, 2012, the Wage and Hour Unit issued a determination finding Slevin was owed $2,554.90 for unpaid wages from May 2012; $406.62 for two days of vacation; and $1,205.00 in unpaid commissions, for a total of $4,166.52. On September 24, 2012, the employer submitted a check in the net amount of $2,886.07, which was deposited in the Wage and Hour Unit's Wage Trust Fund. On October 10, 2012, Slevin filed a timely request for redetermination.

On October 26, 2012, the Wage and Hour Unit issued a redetermination finding Slevin was owed $2,554.90 in unpaid wages from May 2012 and $739.90 in unpaid commissions for a total of $3,294.80. The compliance specialist found Slevin had used all accrued vacation time prior to her separation and was, therefore, owed nothing for vacation time. Slevin timely appealed seeking a contested case hearing.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on December 4, 2012. On December 6, 2012, the Hearings Bureau issued a Notice of Hearing and Telephone Conference. Following a scheduling conference on December 20, 2012, the matter was set for hearing on April 25, 2013.

On March 1, 2013, Slevin filed a Motion for Summary Judgment. Both parties submitted written arguments on the motion. On April 3, 2013, the Hearing Officer issued an Order Granting Partial Summary Judgment, which left only the issue of whether Slevin was owed for unpaid commissions and the issue of whether Slevin was owed for unpaid vacation time. Slevin subsequently filed additional Motions for Summary Judgment on April 10, 2013 and April 23, 2013. The Hearing Officer did not issue orders on those motions because Slevin failed to raise any new issues that were not addressed in the original order issued on April 3, 2013.

On or about April 8, 2013, Michelle Sullivan, respondent's attorney, notified the Hearings Bureau that the parties had achieved an informal settlement that had not yet been put in writing. The Hearing Officer conducted a telephone conference with the parties that day and indicated she wanted to see something in writing in order to keep the matter on schedule. On April 16, 2013, a telephone conference was held with the parties. The parties informed the Hearing Officer that no settlement had been achieved because the respondent's attorneys were negotiating with an attorney who represented Slevin on another matter but did not have Slevin's permission to enter into a settlement agreement on her behalf regarding her wage and hour claim.

On April 22, 2013, the attorneys for UPS filed a motion to allow two witnesses to appear telephonically. On April 24, 2013, a telephone conference was held during which each party presented their arguments regarding that issue. The Hearing Officer allowed the employer's witness, Rendi Bell, to appear telephonically based upon the respondent's representation that she was working out of state and her work schedule would not allow her to travel to Montana for hearing. Given the confusion surrounding the settlement talks, the Hearing Officer found Slevin would not be unduly prejudiced by allowing Bell to appear telephonically. The Hearing Officer ordered the Area Human Resource Manager to appear in person because he appeared to have the most first-hand knowledge of the issues before the Hearing Officer and would be required to review the documents submitted as evidence. The respondent filed a Motion to Quash the subpoenas Slevin had requested for three UPS employees later that same day.

Hearing Officer Caroline A. Holien conducted the hearing on April 25, 2013 at the Job Service office in Bozeman, Montana. The claimant was present and appeared

without counsel. Michelle Sullivan, Attorney at Law, represented the respondent. Slevin and Anthony Nelson, Area Human Resource Manager, presented sworn testimony. Rendi Bell appeared telephonically but did not testify. The respondent withdrew its Motion to Quash after Slevin reported being unable to complete service of the subpoenas upon her witnesses.

The administrative record compiled at the Wage and Hour Unit (Documents AR1 - AR112) was admitted into the record. Claimant's Exhibits D1 through D9, D10 through D14, and D16 through D18 were admitted. Employer's Exhibits A1 through A4; A6 through A8; and A13 through A15 were also admitted.

The parties declined to file post-hearing briefs. The parties were given until May 6, 2013 to submit information regarding Slevin's receipt of commission pay for the first quarter of 2012. On April 30, 2013, the Hearing Officer deemed enough information had been received from the parties regarding that issue and closed the record. The case was then deemed submitted.

II. ISSUE

Whether United Parcel Service, Inc. owes wages for work performed, as alleged in the complaint filed by Jill A. Slevin, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. United Parcel Service, Inc. (UPS) employed Jill A. Slevin as a business development account executive beginning on or about December 27, 2010. Slevin's last day worked was May 17, 2012. Slevin's monthly salary was $4,405.00. Slevin's annual salary was $52,860.00.

2. Slevin was entitled to receive commissions on business accounts assigned to her under the employer's Sales Incentive Program (SIP). UPS bases commission payments upon the revenue generated by the account, as well as the year-to-date performance of the account. Slevin was not eligible to receive commissions on accounts assigned to other account executives. UPS's policies and procedures regarding the payout of commissions is governed by its Sales Resource Reference Manual. Exhibit A14.

3. UPS bases commission payments for departing employees on what it determines was the employee's Average Daily Rate (ADR) for the quarter in which the employee separates from his or her employment. UPS determined Slevin earned $292.33 in commission for April 2012. UPS then determined there were 20 working

days in April, which amount to an ADR of $14.6165 ($292.33 / 20 working days). UPS then determined Slevin had 20 working days in April; 20 working days in May; and five days of accrued vacation, for a total of 45 working days, as defined under UPS's policies and procedures. UPS determined Slevin was owed $584.66 in commission for the second quarter of 2012 and issued her a check in that amount on June 27, 2012.

4. The UPS Vacation Plan, which governed Slevin's employment, states employees with up to five years of service are eligible to accrue two weeks of vacation each year or 0.834 days per month. The UPS Vacation Plan states, in part:

> Vacation is earned in your Vacation Year on a pro-rata basis, meaning that it is earned as your current Vacation Year progresses, and not as a result of your employment in any previous Vacation Year. You cannot carry unused vacation time over from year to year. Unused vacation accruals will be forfeited at the end of each Vacation Year. If your employment with UPS ends during your Vacation Year, you will be paid for earned but unused vacation time.

The UPS Vacation Plan also states that the Vacation Year is January 1 through December 31. Employees are allowed to request advances on his or her vacation time but "no more than two weeks of vacation time will be advanced, and vacation time cannot be advanced into your first six months of employment."

UPS determines employees' commission by determining the employee's Average Daily Rate (ADR). The ADR is determined by dividing the total revenue generated during a quarter and then dividing that by the number of working days for that period. Exhibit A2.

5. UPS allows employees to take up to five discretionary days throughout the year. Employees can take more discretionary days if they work during peak periods such as the holidays. UPS does not pay departing employees for any discretionary days that they choose not to take prior to their separation. Nelson's Testimony.

6. Slevin used all vacation time she accrued from January 1, 2011 through December 31, 2011. Exhibit A4 and Nelson's Testimony. Slevin took seven discretionary days from February 15, 2012 through March 16, 2012. Slevin took no vacation days from January 1, 2012 through May 17, 2012. Exhibit A5 and Slevin's Testimony.

7. Slevin accrued 4.17 days of vacation from January 1, 2012 through May 17, 2012 (.834 days x 5 months). UPS rounds up vacation days to the next

whole number. Slevin accrued five vacation days from January 1, 2012 through May 17, 2012. Nelson's Testimony.

Slevin's annual salary was $52,860.00. There were 260 working days in 2012 (52 weeks x 5 working days = 260 days). Slevin's daily rate of pay was $203.30769 ($52,860.00 / 260). Therefore, Slevin is owed $1,016.54 for the five days of vacation accrued from January 1, 2012 through May 17, 2012. Slevin is not owed additional compensation for the discretionary days she may not have used prior to her separation because those days were not earned by her but, rather, were given to her by the employer as a benefit of her employment. Nelson's Testimony.

8. On May 25, 2012, UPS issued check number 0546348 in the amount of $1,971.64 for wages owed to her for the days she worked in May 2012 and check number 0546347 in the amount of $543.96 for five days of accrued vacation. On June 27, 2012, UPS issued check number 0552829 in the amount of $584.66 for commissions earned during the second quarter of 2012. UPS subsequently stopped payment on those checks after they went uncashed. Exhibit AR15.

9. On September 21, 2012, UPS deposited a check in the amount of $4,382.50, which was dated July 27, 2012. The Wage and Hour Unit deposited that amount in its Wage Trust Fund. None of the special circumstances outlined in Admin. R. Mont. 24.16.7556 apply in this claim. However, it is determined that Slevin is owed $5,002.84. There is a difference of $620.34 between the amount of the monies submitted by UPS and the amount found due to Slevin. Therefore, a 55% penalty shall be applied to that amount. A penalty of $341.18 shall be imposed ($620.34 x 55% = $341.18).

IV. DISCUSSION[1]

Slevin essentially raised three issues in the claim she filed with the Wage and Hour Unit on June 5, 2012. The first issue was addressed in the Order Granting Partial Summary Judgment, which found the parties were in agreement that Slevin was owed $2,781.00 for the 17 working days she had in May 2012. As such, that issue will not be addressed any further.

A. *Commission Owed for the Second Quarter of 2012*

The second issue Slevin raised was whether she was owed additional compensation for commissions earned in the second quarter of 2012. Montana law

[1]Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

requires employers to pay wages when due, in conformity with the employment agreement. Mont. Code Ann. § 39-3-204. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are money the employer owes an employee, including commissions. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473.

As part of this burden of proof, the claimant must prove that in fact an employment agreement for the compensation sought existed between her and the employer. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Id.* at 189, 562 P.2d at 476-77, *citing Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see also, Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.' * * *." *Garsjo,* 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell, supra,* 359 Mich. at 576, 103 N.W. 2d at 497.

Slevin argued she was owed $1,205.00 in commission earned during the second quarter of 2012. Slevin went through each account she believed was rightfully hers and estimated the amount of revenue each account should have been accorded during the period in question. Slevin conceded her estimates were not based upon reports generated during the period in question, but were actually based upon reports generated at different times that were representative of the account and what Slevin believed should have been the revenue for that account.

The employer offered little by way of direct evidence showing their figures were correct; nor did the employer offer any testimony from a witness that would

have the expertise necessary to educate the Hearing Officer as to how the employer figured Slevin's commission for the second quarter of 2012. Nelson readily conceded that he did not have that expertise and was basing his testimony upon information he gathered from reports prepared by individuals who did not attend the hearing.

Slevin pointed out inconsistencies in the employer's records throughout the hearing. While many of the inconsistences were relative to the employer's pay records for the period in question, Slevin's argument that the employer's commission figures were incorrect is persuasive. Slevin established by a reasonable and just inference that she was owed commission for the second quarter of 2012. The employer offered no direct evidence to negate Slevin's testimony that she is owed $1,205.00 in unpaid commission for the second quarter of 2012. Slevin's testimony regarding the issue of her commission payment was detailed and more credible than the evidence presented by the employer. Therefore, it is determined UPS owes Slevin $1,205.00 in unpaid commission for the second quarter of 2012.

B. *Commission Paid for the First Quarter of 2012*

Slevin suggested at the close of hearing that UPS owed her $1,745.00 for commission pay she claimed she might not have received for the first quarter of 2012. Slevin did not raise that issue in her original wage claim and failed to raise that issue until the close of hearing.

The Montana Supreme Court has held that it is not appropriate to permit an amendment to a complaint when the party opposing the amendment would incur substantial prejudice as a result. *Stundal v. Stundal*, 2000 MT 21, ¶12, 298 Mont. 141, 995 P.2d 420. In addition, where a party seeks an amendment to allege a new theory of recovery that should have been but was not plead and such an amendment would cause undue prejudice to the opposing party because it would involve different defenses, it is not inappropriate to grant the amendment. *Loomis v. Luraski*, 2001 MT 223, 306 Mt. 478, 36 P.3d 862.

Permitting Slevin to amend her claim at this late date would inflict unfair prejudice on the respondent. Slevin knew or should have known from at least the time she filed her initial wage and hour claim in June 2012 that she was owed commission for the first quarter of 2012. Slevin did not raise that issue in her initial claim, during discovery, or until the close of hearing, which was held approximately 11 months after her initial claim. The respondent has had no opportunity to engage in discovery on the issue to properly defend against the claim. For that reason alone, the motion must be denied.

There is yet a second reason that it must be denied. The amendment cannot be permitted because it was never alleged in the complaint and this new complaint is beyond the statute of limitations. *Cf. Sprow v. Centech*, 2006 MT 27, ¶24, 331 Mont. 98, 128 P.23d 1036 (holding that it was error for hearings officer to permit modification of complaint to find discrimination with respect to full time employment where complaint alleged discrimination only in part time employment).

Even if the Hearing Officer was to examine the merits of Slevin's claim, her allegation that she did not receive commission pay for the first quarter of 2012 is not credible. Given the multitude of documents and reports she generated during the adjudication process, it seems unlikely that her receipt of commission pay for the first quarter of 2012 escaped Slevin's attention. It seems even less likely that Slevin never complained to the employer about not receiving her commission pay for the first quarter of 2012 given her separation occurred more than six weeks after the end of the first quarter. Slevin was given the opportunity to check her bank accounts, as was the employer, after the hearing to determine whether or not the payment was made. The employer quickly informed the Hearing Officer that their records reflected payment had been made. Instead of giving a direct answer of yes or no, Slevin chose to attack the credibility of the employer's documentation. For the reasons set forth above, Slevin is not entitled to receive additional compensation for the commission pay she claims not to have received for the first quarter of 2012.

C. *Vacation Pay*

The third issue raised by Slevin in her wage and hour claim was whether she was owed additional compensation for accrued vacation time.

Wages, as contemplated by Mont. Code Ann. § 39-3-204, also includes unpaid vacation pay. *Langager v. Crazy Creek Products,* 1998 MT 44, 287 Mont. 445, 954 P.2d 1169. An employee seeking unpaid wages has the burden of proving by a preponderance of the evidence that she was not compensated in compliance with her employment agreement. *Berry, supra* 262 Mont. at 426, 865 P.2d at1112. As part of this burden of proof, the claimant must prove that in fact an employment agreement for the compensation sought existed between her and the employer.

Slevin testified she engaged in a series of email conversations with Area Human Resource Manager Jeff Grant at the beginning of her employment in which he promised her that she would receive two full weeks of paid vacation each year rather than accrue two weeks of vacation throughout the vacation year as provided for under the employer's Vacation Plan. In support of her testimony, Slevin offered one email dated March 2, 2011 in which Grant wrote, in part, "Details of our conversation and the exceptions with your benefits must not be shared with anyone

else." Exhibit D11. Slevin did not offer an explanation as to why she did not offer the specific email in which Grant made the promise regarding her vacation time.

Nelson testified he had never before seen an exception to the vacation policy as described by Slevin. It seems unlikely that any such exception was made given Slevin's failure to produce any documentation in support of her contention. It is puzzling that Slevin would offer only one email, which was sent to her more than two months after her date of hire and makes no mention of any exception to the employer's vacation policy given her testimony that she possessed a chain of emails between herself and Grant describing the various exceptions to the employer's policies carved out for her. It also seems unlikely that any such exception was made given Nelson's testimony that he had never before seen such an exception in his several years of employment with UPS. The evidence shows the UPS Vacation Plan, and all of its terms, applied to Slevin and governed her vacation accrual, as well as her use of her accrued vacation time.

The evidence shows Slevin used all of her accrued vacation time in 2011. Exhibit A3. The evidence also shows Slevin used seven discretionary days from January 1, 2012 through May 18, 2012. Exhibit A4. The employer's policy does not allow for payment of unused discretionary days. See Exhibit A2 and Nelson's Testimony.

Nelson provided detailed testimony regarding how the employer calculated the days of vacation Slevin had accrued prior to her separation. Given that Nelson's testimony was consistent with the information offered by the employer during the adjudication process, and Slevin failed to offer substantial credible evidence to negate Nelson's testimony, Nelson's testimony is deemed credible.

The evidence shows Slevin accrued .834 vacation days each month for a total of 4.17 days accrued from January 1, 2012 through May 18, 2012. The employer's policy allows for the number of days to be rounded up to the next whole number. Slevin's annual salary was $52,860.00 and there were 260 working days in 2012 (52 weeks x 5 days). Slevin's daily rate of pay was $203.30769 ($52,860.00 / 260 working days). Therefore, Slevin is owed $1,016.54 for five accrued vacation days (5 days x $203.30769).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. UPS owes Jill Slevin $2,781.30 in unpaid wages for the period of May 1, 2012 through May 17, 2012, as determined in the Order Granting Partial Summary Judgment dated April 3, 2013.

3. UPS owes Jill Slevin $1,205.00 in unpaid commission for the second quarter of 2012.

4. UPS owes Jill Slevin $1,016.54 in unpaid vacation time for the period of January 1, 2012 through May 17, 2012 (5 days x $203.30769).

5. For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566. UPS must pay a penalty in the amount of $341.18 on the difference between the amount found owed to Slevin and the amount submitted to the Department by the respondent prior to the issuance of the determination ($5,002.84 - $4,382.50 = $620.34 x 55% = $341.18).

VI. ORDER

United Parcel Service, Inc., d/b/a UPS, is hereby ORDERED to tender a cashier's check or money order in the amount of $961.52, representing $620.34, the difference between the $5,002.84 in wages found to be owed and the $4,382.50 the respondent already submitted to the Department, and $341.18 in penalty, made payable to Jill A. Slevin, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. UPS may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 15th day of May, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.